FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
UPPER MIDWESTERN REGION

UNITED FOOD & COMMERICAL
WORKERS, LOCAL 789,

UNION,

and,

GRIEVANCE ARBITRATION
FMCS CASE NO. 060608-56901-7
ARBITRATOR'S AWARD

HIGHLAND CHATEAU CARE CENTER,

EMPLOYER.

ARBITRATOR:	Rolland C. Toenges
DATE AND PLACE OF HEARING:	August 15, 2006 South St. Paul, MN
RECEIPT OF POST HEARING BRIEFS:	September 2, 2006
DATE OF AWARD:	September 22, 2006

ADVOCATES

FOR THE EMPLOYER:	FOR THE UNION:
George J. Stunyo, Consultant	Roger A. Jensen, Attorney

WITNESSES

Michelle (Missy) Kistner, Staffing Coordinator	Michelle (Missy) Kistner, SC
Robin Przepiora, Director of Nursing	Jeanine Owusu, BA, UFCW
Mary Fukar, Certified Nursing Assistant	Hans Kohene, Grievant
Mary Beth Lacina, Administrator	

ISSUE

Was the Grievant terminated for "just cause?" If not, what is the appropriate remedy?

JURISDICTION

The matter at issue, regarding interpretation of terms and conditions of the Parties Collective Bargaining Agreement (CBA) relative to termination of the Grievant, came on for hearing pursuant to the "Arbitration" and "Termination of Employment and Discipline" provisions contained in said agreement.

The Arbitration provision (Article 9) provides:

> "Step 4. If the grievance is not resolved in Steps 2 or 3, either party may refer the matter to arbitration. Any demand for arbitration shall be in writing and must be received by the other party within ten (10) calendar days following the Step 2 or Step 3 meeting. The Employer and the Union shall attempt to agree on a neutral arbitrator who shall hear and determine the dispute. If no agreement is reached, the arbitrator shall be selected from a list of seven (7) neutral arbitrators to be submitted to the parties by the Federal Mediation and Conciliation Service. The Employer and Union shall each alternately strike one (1) name, and the order of striking shall be determined by chance. The remaining arbitrator, after each party has made three (3) strikes, shall hear and determine the dispute.
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> 9.2 The authority of the arbitrator shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement, and the arbitrator shall have no authority to add to, subtract from or modify in any manner the terms and provisions of this Agreement. The award of the arbitrator shall be confined to the issues raised in the written grievance and the arbitrator shall have no power to decide any other issue.
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> 9.3 The award of the arbitrator shall be made within thirty (30) calendar days following the close of the hearing. The award of the arbitrator shall be final and binding upon the Employer, Union and employees involved. The fees and expenses of the neutral arbitrator shall be divided equally between the Employer and the Union.
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> 9.4 The time limitations set forth herein relating to the time for filing a grievance and the demand for arbitration shall be mandatory. Failure to follow said time limitations shall result in the grievance being permanently barred, waived and forfeited, and shall not be submitted to arbitration. The time limitations provided herein may be extended by mutual agreement of the parties."

The "Termination of Employment and Discipline" provision (Article 8) provides:

> 8.1 Employees may not be suspended, demoted or discharged except for just cause. No grievance relating to any disciplinary action shall be valid unless submitted to the Employer in writing within ten (10) days after the suspension, demotion or discharge in question. In case of discharge, the

employee affected may request and shall receive from the Employer in writing the reason for said dismissal.

8.5 If the employee fails to report for work as scheduled or to furnish the Employer with a justifiable excuse within twenty-four hours thereof, such failure to report to work shall be conclusively presumed to be a resignation from the service of the Employer and termination of such employee's seniority and employment, provided, however, that if such employee can within two (2) days furnish the Employer with reasonable proof that such employee could not notify the Employer of his absence because of unforeseen emergency, then such employee shall be reinstated without any break in the service record."

The Parties selected Rolland C. Toenges as the neutral Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration hearing was conducted as provided by the terms and conditions of the CBA and FMCS rules and regulations. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute.

The Parties stipulated that the matter in dispute is arbitrable and to the issue statement.

The Parties have no objection to publication of the Arbitrators Award.

There was no request for a stenographic record of the hearing.

The hearing was closed upon receipt of the Parties Post Hearing Briefs on September 2, 20006.

BACKGROUND

Highland Chateau Care Center (Employer) provides nursing care for some 64 resident patients. The Union represents a bargaining unit of some 50 employees who provide patient care and perform housekeeping tasks.

The Grievant is 54 years old, emigrated from Liberia in 1981 and is a United States Citizen. He attended High School and two years of college in Liberia. The Grievant has worked in nursing homes most of the time he has lived in the Unites States. The Grievant was employed at Highland Chateau Care Center for about five (5) years prior to his termination.

The Grievant's termination resulted from the Employer's application of Section 8.5 of the CBA, based on its finding that he failed to call in or show up for work as scheduled on May 31, 2006 and failed to provide a justifiable excuse.

Thereafter, the Union grieved the termination claiming that the work schedule was not properly posted.

The Parties having been unable to resolve the dispute referred the matter to binding arbitration resulting in the instant Arbitration proceeding.

JOINT EXHIBITS

J-1. Collective Bargaining Agreement, effective July 1, 2005 through June 30, 2007.

J-2. Employee Incident and Warning Record, dated 5/31/2006, RE: Hans Kohene.

J-3. Letter, Subject: Termination/Mediation dated June 8, 2006, Owusu to Lacina.

EMPLOYER EXHIBITS

E-1. PM Open Shifts (NAR) from May 29 through June 11, 2006.

E-2. Personal Notes of Betty Thompson dated June 12, 2006.

E-3. Personal Notes of Missy Kistner, dated May 31, and June 1, 2006.

E-4. PM Open Shifts (NAR) from February 7 through February 17, 2006
PM Open Shifts (NAR) from February 22 through March 4, 2006.
NOC Open Shifts (NAR) from April 4 through April 16, 2006.

E-5. Days and Hours Hans [Grievant] worked from May 22 to June 4, 2006.

E-6. Personal Notes of Robin Przepiora, dated June 5, 2006.

E-7. Personal Notes of Mary Fukar, dated June 9, 2006.

E-8. Excerpt from CBA (Section 8.5).

E-8. Highland Chateau Employee Incident and Warning Record, dated June 5, 2006, regarding Grievant's alleged failure to report for his scheduled shift on May 31, 2006. (Same as J-1)

E-9. Excerpt from Employee Handbook, "No Call/No Show."

E-10. Signature Page of Personnel Policy Handbook signed by Grievant on March 23, 2006.

E-11. Schedule of four (4) "No Show/No Call" terminations, April 9 through July 31,

2006.

UNION EXHIBITS

U-1. Personal Notes of Jeanne Owusu, dated June 5, 2006.

POSITIONS OF THE PARTIES

THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:

1. Management's case is clearly the most logical and believable and should be affirmed.

2. It is critical that employees be present to care for patients who are vulnerable adults.

3. Management has more than satisfied its burden of proving just cause for terminating the Grievant.

4. The Grievant received both procedural and substantive due process.

5. The Grievant was represented by the Union and given the opportunity to offer a reasonable excuse for failing to report for his scheduled shift on May 31, 2006.

6. Substantive due process is met by the fact that termination is the negotiated penalty for a no-call/no-show event as set forth in Section 8.5 of the CBA.

7. Grievants are entitled to fair and efficient administration of their case, but are not entitled to pristine/perfect handling of their case.

8. Management's case testimony and exhibits are more convincing and credible – they are logical and well documented.

9. The Grievant's testimony was uniformly evasive – his responses were designed to avoid answering questions.

10. If Missy Kistner had failed to circle the Grievant's name, as the Grievant contends, one of the employees would surely have come to Management about the oversight – none did.

11. The fact that 17 of the 18 employees on the work list showed up for their appointed shifts speaks volumes in support of Missy Kistner's testimony that the Grievant's names was timely circled.

12. The Employer has been consistent (E-11) in treating all other union employees and non-union employees the same regarding a "no-show/no-call" situation.

13. The Grievant either (a) knew of the shift and chose not to report or call or, (b) failed to see his name circled on the board. Management cannot possibly explain why he didn't call or show on May 31, 2006, but can only respond to the fact that he was a no-call/no-show.

14. Management responded in a reasonable and prudent fashion. Therefore, the grievance should be denied and dismissed in its entirety.

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

1. An alternate theory to Missy Kistner having circled the Grievant's name on the work schedule before posting it is that, when no one showed up for the shift, she later circled his name to shift the blame on him, fearing she would get into trouble.

2. Robin Przepiora's assertion that the Grievant lied to her about not working May 30, 2006 is contrary to her contemporaneous notes from their meeting (E-6) - "Hans stated he was off then and he did not know the shift was given to him."

3. Jeannine Owusu testified that she was at the meeting with Prepare and she specifically recalled the Grievant telling her that he worked the Tuesday before (May 30).

4. Owusu's notes are consistent with her testimony – "Hans checked sign-up sheet and did not see his name circled. He did not work on 5/31. (Checked sign-up sheet on 5/30)."

5. The Employer has failed to sustain its burden of proof, by a preponderance of the evidence, that the Grievant's name was red circled by Ms. Kistner or that the Grievant knew that it was red circled.

6. The threshold question to be decided is whether or not the Grievant knew that he was scheduled to work on May 31, 2006.

7. This is not a case where the day the employee failed to report was a regularly scheduled shift and, accordingly, knowledge of the shift assignment is presumed.

8. The Grievant volunteered to work the May 31, p.m. shift, but there was no guarantee that he would be assigned that shift because of the possibility that a more senior employee would also volunteer for the shift and would be given the assignment.

9. The testimony of Ms. Kistner that she did circle the Grievant's name and his testimony that she did not is a stand-off – the proverbial "he said/she said" and that is insufficient to sustain the burden of proof. The Grievant's testimony is equally believable to Ms. Kistner's on that issue.

10. It is equally plausible that Ms. Kistner made an error, and fearful that she would be blamed, circled the Grievant's name before anyone noticed it.

11. The evidence showed that Ms. Kistner had a proclivity for making minor errors:

    a. She left the posting up for eight days rather than seven as required by Article 4.1.2 of the CBA. Employees complained about this because it would allow a more senior employee to improperly take a shift away from the next senior employee who had signed the list during the seven-day window, by signing the sheet on the 8th day.

    b. She did not put the date on the list when she reposted the list with the names circled, as she admitted she had promised business agent Owusu she would do.

    c. She admitted that she deviated from the normal practice by not reposting the list on the same day she took the list down, which was probably the reason the steward went to her office and took the list and posted it for Ms. Kistner. That may also explain why she hadn't circled the Grievant's name; she hadn't completed the schedule when the steward took the list.

12. The Grievant is a hard-working and conscientious worker. No evidence of prior disciplinary actions was presented and the employer admitted he never missed a shift like this before. He wanted to work the extra shift; otherwise he would not have signed up for it.

13. If the Grievant knew he was scheduled to work on May 31, and he decided later he did not want to work, all he would have had to do is call in sick or give some other reasonable excuse and he would not have been disciplined. Instead, he told the truth; that he didn't believe he was scheduled on May 31, because his name wasn't circled.

14. Another plausible explanation that would take the facts of this case out of the "no-call/no-show" classification is that the Grievant's name was circled, but the Grievant missed seeing his name because there were other sheets posted on May 30.

15. The Grievant testified that he saw his name was circled for another open shift on a second sheet also posted on May 30. If the Grievant erroneously missed seeing his name posted for the May 31. p.m. shift, so that he honestly but erroneously believed he was not scheduled, it cannot be claimed that he intentionally resigned his employment as Article 8.5 states.

16. A "no-call/no-show" should require knowledge on the part of the employee that he was scheduled to work on a particular day and then intentionally left the employer short-staffed by not reporting for duty and not bothering to call in advance to allow the employer to find a replacement. The Grievant is not such an irresponsible person and the facts do not support such a conclusion.

17. The Arbitrator should conclude that the "no-call/no-show" provision of Article 8.5 of the CBA does not apply in the instant case because there are a least two reasonable scenarios that support the Grievant's consistent contention that he didn't know he was scheduled to work May 31.

18. These scenarios are equally plausible to the Employer's claim that the Grievant knew he was scheduled to work May 31, and that his intentional failure to show up for work and his intentional failure to call-in constitutes a voluntary resignation.

19. The Union requests the Arbitrator to sustain its grievance and reinstate the Grievant with back wages, benefits and seniority, less interim earnings.

TESTIMONY OF WITNESSES

Employer Witness, Michelle (Missy) Kistner testified that she is the receptionist and staffing coordinator for Highland Chateau Care Center. Part of her job is to schedule workers for shifts. She keeps track of employees and hours worked, including extra shifts worked.

Kistner introduced E-1, which is the afternoon open shift schedule for Nursing Assistants Registered, covering the date at issue in the instant case (May 31, 2006). The schedule is posted in the employee break room for seven (7) days. Interested employees can sign up to work the open shifts during the seven-day posting period. After the seven-day posting period she takes it down, circles in red employees assigned to work the open shifts based on their seniority, as required by the CBA and reposts the schedule.

E-1 was posted on May 16, 2006. It was taken down on May 24, 2006 and reposted with the names of employees assigned to work the open shifts on May 25, 2006. Kistner testified that she circled the Grievant's name to work the p.m. shift on May 31, 2006.

Union Steward, Betty Thompson, offered to repost the register for Kistner. Kistner verified that it was posted by observing it in the break room and later via a note from Union Steward Thompson (E-2)[1].

Kistner received a call from Sandra Stewart at 4:00 p.m. on May 31, 2006 saying that the Grievant was not at work and he had not called in. Kistner then called the Grievant and left a message inquiring why he was not at work.

Kistner prepared a memo (E-3) regarding the events related to the Grievant's failure to report for the May 31 shift and a conversation with him on June 1.

Kistner testified that the Grievant has a history of working extra shifts. Kistner introduced E-4, which shows that the Grievant has signed up for and worked extra shifts following the established procedure, which was the same as in effect on May 31, 2006.

Kistner introduced E-5, which shows days and hours worked by the Grievant from May 22 through June 4, 2006, the pay period in which the incident at issue occurred. E-5 shows that the Grievant was at work on May 22, 24, 25, 26, 29 and 30, the period during which the register was posted for signup and reposted with the names of employees circled who were assigned the extra shifts.

Kistner testified that she personally circled the 18 names on E-1 and all showed up for work as assigned, except the Grievant.

On cross-examination, Kistner acknowledged that she had received a request from Union Representative Jeanine Owusu to put the date on the register when it is reposted and agreed to do so. Owusu's request was prior to the reposting of the schedule in the instant matter (5/25). Kistner acknowledged that she forgot to enter the reposting date on the schedule at issue in the instant matter. Kistner acknowledged that there had also been another incident where she had forgot to enter the reposting date and this had been within a month after Owusu's request. Kistner testified that since May 31, 2006, she has consistently entered the date reposted on the bottom of the posting.

Kistner testified that when she questioned the Grievant on June 1, he said he didn't see his name on the posting. Kistner acknowledged that this had never happened with the Grievant before.

On re-direct, Kistner testified that other employees who have had a "no-call/no-show" situation were discharged.

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[1] The Union objected to admission of E-2 as the author was on vacation and not available to stand cross-examination regarding the exhibit.

Employer Witness, Robin Przepiora, Director of Nursing, testified that she has been in this position since March 2006. She previously was a supervisor and Nursing Assistant Registered.

Przepiora learned from Ms. Kistner about 3:30 p.m. on June 1, 2006 that the Grievant was a "no-call/no-show" on May 31. She did not discuss the situation with the Grievant on his June 1 shift because she wanted to do it in private and there was no replacement available. To do so would have shorted staff and residents would get the short end of the stick – longer waits for feeding and toilet, etc. Therefore, she let Grievant work the balance of his shift and later called him and left a message that she wanted to see him on June 2, 2006, but never heard from him.

Przepiora met with the Grievant on Monday June 5 to discuss the "no-call/no-show" incident and to determine the facts.

Przepiora introduced E-6, a memo she prepared for file regarding her meeting with the Grievant on June 5. Przepiora testified that the Grievant said he was not able to see the schedule and did not see he was awarded the shift. Ms. Kistner then brought in documents showing that the Grievant was at work the two shifts prior to May 31 and could have seen the schedule with his name circled. Przepiora testified that E-5 shows that the Grievant worked May 25, 26, 29 and 30, which was ample time to see the posting with his name circled.

Przepiora testified that it was a joint decision to discharge the Grievant between herself and Administrator Mary Beth Lacina.

On cross-examination, Przepiora acknowledged the statement in her memo that "Hans stated he worked the Tuesday before and he was not circled on the pick-up shift list." Ms. Kistner brought in documents to show he had worked on May 30 and his name was circled.

Przepiora testified that she doesn't know if Ms. Kistner had made prior mistakes. She has never known Ms. Kistner to later circle a name and doesn't believe she would do such a thing, but acknowledged anything is possible.

Przepiora testified that she didn't talk to the Grievant on June 1 because she wanted to talk to him in private and didn't have a worker to cover his duties at that time. She had left work before his shift ended at 11:00 p.m. She also did not want to talk to him during his shift because it tends to have an effect on other staff and the residents – it brings too much distraction to residents.

On re-direct, Przepiora testified that during the meeting on June 5, the Grievant told her he wasn't at work and didn't see the posted schedule.

On re-cross-examination, Przepiora testified that at the meeting it was very clear that the Grievant's excuse was that he didn't work before May 31 so he didn't see the schedule. Ms. Kistner brought in documents to verify when the Grievant worked and that his name was circled on the posting.

Employer Witness, Mary Fukar testified that she is a Certified Nursing Assistant and has been employed at Highland Chateau Care Center for some six years. Fukar testified that she worked May 25, 2006 and the extra shift schedule was posted. Fukar introduced her personal note dated June 9, 2006 (E-12) that she saw the schedule the very day that it was posted on May 25, 2006.

Employer Witness, Mary Beth Lacina, Administrator of Highland Chateau Care Center, testified that she has been in that capacity for about 10 months and is responsible for all administration, financial matters, etc.

Lacina testified that Ms. Przepiora informed her of the Grievant's "no-call/no-show" situation. On June 5, she participated in the meeting with the Grievant along with Union Representative Owusu, Ms. Przepiora and Ms. Kistner. The decision to discharge the Grievant was a joint decision between her and Ms. Przepiora following the rules and CBA when addressing a "no-call/no-show" situation.

Lacina introduced an excerpt from the CBA, Section 8.5 that calls for termination if no justifiable excuse for a "no-call/no-show." She testified that the Grievant was untruthful when he claimed he did not work days prior to May 31.

Lacina introduced the "Employee Incident and Warning Record" (E-8) setting forth the charges against the Grievant and the decision to discharge him.

Lacina introduced an excerpt from the "Highland Chateau Employee Handbook" (E-9) setting forth provision on "No-Call/No-Show."[2]

Lacina introduced a signature page from the "Highland Chateau Employee Handbook" signed by the Grievant (E-10).

Lacina introduced a listing of employees terminated during her term as Administrator because of "no-call/no-show." These terminations occurred during the period April 9 through July 31, 2006 (E11).

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[2] Highland Chateau Employee Handbook, page 17:

> "No-Call/No-Show" Absenteeism without supervisory approval (i.e. "no-call/no-show") is considered to be a voluntary resignation. If the employee provides a valid excuse within twenty-four (24) hours of being absent it will count as one (1) absence. The second "no-call/no-show" will be considered a voluntary resignation."

On cross-examination, Lacina acknowledged that she didn't discipline Ms. Kistner for not reposting the extra shift schedule herself and allowing Union Steward Thompson to do so. Lacina defended her action on the basis that Ms. Kistner did nothing wrong.

Lacina acknowledged that she did not make her own personal notes of the meeting on June 5, 2006 and Ms. Przepiora's prepared the only notes of the meeting.

Lacina testified that the Grievant said he was not at work on the shifts prior to May 31, and the evidence shows he was untruthful about that and that his name was not circled. If his name was not circled, someone else would have asked for the extra hours – they always do and as they want extra hours.

On re-direct, Lacina testified that the Grievant said he had not worked on the days prior to May 31 and did not know he was on the pick-up list.

Union Witness, Michelle (Missy) Kistner, testified that the posting at issue (E-1) was posted on May 16 and taken down on May 24, 2006. It was up for eight (8) days even though the CBA calls for seven (7) because she was very busy and didn't get a chance to take it down on the seventh day. Kistner testified that she has had no complaints from employees about having an extra day to sign up.

Kistner testified that Union Steward Thompson asked if she was done with the posting and, if so, offered to post it for her. Kistner testified that this is not unusual as Thompson does thus every once in awhile.

On cross-examination, Kistner testified that she did not circle the Grievant's name later and she was sure about this as she does all of them [circles names] at once. Kistner testified that she has never gone back and added names later. Kistner testified that putting the posting date on the bottom of the schedule was not a CBA requirement, but was an accommodation to the Union.

Union Witness, Jeanine Owusu, testified she is the Business Agent for UFCW Local 789 and has been with the Union for about six years.

Owusu testified she is responsible for representing employees at Highland Chateau Care Center and is familiar with the Grievant's discharge. She was at the meeting on June 5, 2006 involving the Grievant, Lacina, Przepiora and Kistner.

Owusu testified that the Grievant stated he did not see his name circled on the schedule. She did not hear him say he was not at work on the days prior to May 31.

Owusu testified that Ms. Kistner brought documents into the meeting that showed the Grievant worked shift prior to May 31 (May 25, 26, 29 and 30).

Owusu testified that about two weeks prior to the incident at issue, she had talked to Ms. Kistner about employees not getting extra hours based on seniority and suggested she put the date the schedule was posted, to which Ms. Kistner agreed.

Owusu testified that the CBA (J-1), Section 4.1.2, provides for the posting to be up for seven (7) days and then taken down and reposted. If posted longer than seven (7) days, employees complain because more senior employees may sign up on the 8th or day, or later, and bump the less senior employees who signed up during the seven-day period.

On cross-examination, Owusu acknowledged that she was at the June 5, 2006 meeting with the Grievant and prepared notes of the meeting (U-1).

Owusu acknowledged that not everything called for in the CBA is applied exactly every day.

Owusu acknowledged that her asking Ms. Kistner to put the date of posting on the schedule was not called for in the CBA but was to make things work better. She testified that the date was correct when the schedule was first posted [5/16/06] but was not updated when the schedule was reposted on 5/25/06.

Owusu acknowledged that even if Ms. Kistner had put 5/25/06 on the schedule when it was reposted this would not have changed the matter at issue in the instant case where the Grievant claims he did not see his name circled. She acknowledged that the other 17 employees circled on the schedule saw it and showed up for their shifts.

Owusu clarified that the seven-day posting period in the CBA refers to a solicitation of employees who want to sign up for extra shifts and acknowledged that the fact it was posted for an additional day has no effect on the Grievant's claim that he did not see his name circled.

Owusu acknowledged that there has been no recent grievances regarding the posting system and the Employer has worked with the Union to resolve issues.

On re-direct, Owusu testified that the posting up for 8-days was an error and Ms. Kistner's failure to enter the date reposted was another error. Owusu testified that Ms. Kistner usually reposts the same day the schedule is taken down, but in the instant case it was reposted the following day.

Owusu introduced her notes from the June 5, 2006 meeting with the Grievant and Employer representatives. Owusu testified that her notes state that the Grievant said he did not see his name on the schedule when he checked it the day before.

On re-cross-examination, Owusu acknowledged she also makes errors.

Owusu acknowledged that the comment in her notes "(checked sign-up on 5/30)" was not given by the Grievant and she put that date on herself.

Owusu acknowledged that there have been three (3) Union employees discharged for "no-call/no-show" during the time she has been representing employees at Highland Chateau Care Center.

Owusu acknowledged that if an employee fails to show and doesn't call it is a breach of duty to the Employer under the terms of the CBA. Further it makes no difference to residents if the "no-call/no-show" occurs on a regular shift or on an extra shift.

Owusu acknowledged that she has participated in several CBA negotiations with the Employer.

Union Witness, Hans Kohene, testified that is 54 years of age, has five children ranging in age from 18 to 26 years of age and has several grandchildren. He is a United States Citizen and emigrated from Liberia in 1981. He has worked in nursing homes most of the time he has been in the USA and has worked the past five years at Highland Chateau Care Center.

Kohene testified that the information contained on E-5 seems accurate showing that he was at work on May 22, 24, 25, 26, 29 and 30.

Kohene testified that he checked the extra shift schedule on May 30 but his name was not circled in red. There was another schedule for another period also posted at the same time and his name was not circled on it either. He could have worked and wanted to work on May 31.

Kohene testified that at the meeting on June 5, 2006 he told them that he worked on May 30, 2006 and that his name was not circled.

Kohene testified that there have been other employees who didn't show up and were not at work, but they are still working and not fired, i.e. Abby from Egypt.

Kohene testified that he wants his job back and will be a good employee if reinstated.

On cross-examination, Kohene testified that he has never lied in his 54 years and that he checked the schedule on May 30.

Kohene testified that he keeps his schedule in his head but checked both schedules on May 30.

Kohene acknowledged that of course he has made mistakes in his 54 years but it is not possible that he made a mistake when he looked at the schedule on May 30.

Kohene acknowledged that he received two calls from Ms. Przepiora.

Kohene acknowledged that he has missed work at Highland and other places.

Kohene acknowledged that he doesn't know the circumstances of Abby's absence – she told him she wasn't scheduled.

On re-direct, Kohene testified that he has an answering machine but don't know if Ms. Kistner left a message.

DISCUSSION

At issue in the instant matter is the ultimate penalty that can be imposed on an employee, loss of employment. The Grievant is charged with failing to call or show up for his assigned shift. The shift at issue is actually not his regular shift but an extra shift he signed up to work.

In most industries failure to call or show up for work is a serious matter but will not usually result in discharge if it is the first and only offense. However, Highland Chateau Care Center is responsible for the care of residents who are there because they lack the ability to provide essential personal care for themselves such as eating, bathing and toiletry. If shifts are not adequately staffed, the detrimental effect on residents is obvious. The effect on residents is the same whether the shift at issue is a regular shift or an extra shift.

The importance of adequate staffing is recognized in the CBA negotiated by the Parties. The Parties, via mutual agreement, have established Section 8.5 that provides for the termination of an employee that does not call or show up for an assigned shift and cannot provide reasonable proof that it was because of an unforeseen emergency. The hearing record shows that this provision is enforced and several employees have been terminated in the current year for failure to call or show up for their assigned shift.

The CBA in Section 9 (Arbitration) sets forth the Arbitrator's authority in specific terms.[3] The Arbitrator's authority is limited to interpretation of, or adherence to, the written provisions of the CBA. The Arbitrator has no authority to add to, subtract from or modify the terms and provision in any manner. The Arbitrator is confined to the issues raised in the grievance and has no power to decide any other issue.

Based on the above CBA terms and provisions, the Arbitrator must find termination of the Grievant to be for just cause, if the hearing record fails to show that the Grievant has "a justifiable excuse" for his failure to call-in or show up for work on May 31, 2006.

The critical issue in the instant matter is whether the Grievant's failure to call or show up was due to his own negligence or due to a failure in the system used to notify employees when they are assigned a shift they have signed up to work.

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[3] CBA, Section 9.2

The Grievant claims that his name was not circled on the schedule, the process used to notify employees when they are assigned an extra shift. The Employer claims that the Grievant's name was circled and he had the same opportunity to acknowledge it, as did the other 17 employees whose names were also circled.

As is often the case when there is conflicting testimony the Arbitrator must assess the relative creditability of witness testimony and the quality of evidence.

The record shows that the extra shift schedule at issue was posted on May 16 for employees interested to signing up for the work. The Schedule contained the names of numerous employees who signed up for the extra shifts, including that of the Grievant who signed up to work the p.m. shift on May 31. The schedule was taken down on May 24 for the purpose of identifying those employees to be assigned the extra shifts based on their seniority.

Staffing Coordinator, Kistner identified the employees who were to work the extra shifts by circling their name in red. The schedule was then reposted on May 25 with the names of employees awarded the extra shift work circled in red. Seventeen (17) of the eighteen (18) employees assigned extra shifts on the schedule reported for and worked their assigned shifts. Only the Grievant alleged that his name was not circled on the schedule.

There were some irregularities in the posting process. The initial posting was left up for eight days rather than the seven called for in the CBA. When the schedule was reposted on May 25, the Union Steward posted it rather than the Staffing Coordinator who normally posts the schedule. Also the date it was initially posted (5/16/06) was not updated to reflect the reposting date of 5/25/06, a detail that had been recently added to the posting process.

Although the above referenced irregularities raise some question as to the fallibility of the Staff Coordinator, they did not have any relevance to the Grievant's failure to call or show up for work on May 31.[4].

The record shows that the posting having been left up for an extra day did not affect the Grievant's eligibility to work the extra shift on May 31. He was still the senior employee who signed up and had the right to work the shift.

The record shows that the schedule having been posted by the Union Steward did not affect the Grievant's ability to view the schedule as it was posted on May 25.[5] The posting on May 25 gave the Grievant four workdays to observe it prior to the day the extra shift was to be worked on May 31. The record shows that the posting period was

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[4] Testimony of Jeanine Owusu on cross-examination.

[5] The testimony of Michelle (Missy) Kistner and Mary Fukar (E-12) was that the posting was up on May 25. This was also supported by the written statement of Union Steward, Betty Thompson (E-2).

also adequate for the other seventeen (17) employees who had signed up for extra shifts, three of which worked their extra shift on May 29.

The failure to update the posting date from 5/16/06 to 5/25/06 also did not affect the Grievant's ability to work the extra shift or his opportunity to view whether he had been assigned the shift when posted on May 25. With at least seventeen (17) names circled in red, the Grievant could not have mistaken it as still being in the sign up period, particularly considering he was familiar with the process.[6]

The crux of the issue is who is mistaken, the Staffing Coordinator who claims she circled the Grievant's name along with the other seventeen (17) employees, or the Grievant who claims he did not see his name circled when he viewed the schedule on May 30. Such a determination calls for an examination of the relative creditability of the Staffing Coordinator and the Grievant.

The Union pointed to several errors made by the Staffing Coordinator and theorizes that she also errored in failing to circle the Grievant's name. The Union theorizes that she circled it later in an attempted to cover up her error, this being the reason the Grievant did not see his name on the schedule when he allegedly viewed it on May 30.

The Staffing Coordinator, on cross-examination steadfastly insisted she did circle the Grievant's name on the schedule when it was reposted on May 25. She stated that she "does them all at once and has never gone back and added a name later." Robin Przepiora, Director of Nursing, testified that she has never known the Staffing Coordinator (Kistner) to later circle a name and doesn't believe she would do such a thing. Administrator, Mary Beth Lacina, testified that she did not discipline Kistner for allowing the Union Stewart to repost the schedule, because she did nothing wrong.

The Employer points to the fact that there was no inquiry by the Grievant, or any other employee who signed up for the extra shift in question, as to why someone had not been assigned it. The Employer contends that if no name was circled for the shift in question, an inquiry from one or more of the employees who had signed up for the shift could be expected. Administrator, Mary Beth Lacina testified that, "if his name [Grievant] wasn't circled, someone else would have asked for the hours – they always do and want the extra hours". The record (E-1) shows that three employees, including the Grievant had signed up for the shift at issue. It is noted that the Grievant's name on the schedule (E-1) was very visible and at least as visible as any of the other names on the schedule.

The Union also theorizes that the Grievant was confused by the fact that there was two extra hour schedules posted at the same time and may have looked at the wrong schedule when looking to see if his name was circled. However, the Grievant's testimony was that he "checked the schedule on 5/30, but his name was not circled in red - there was another schedule for another period of time, but he wasn't circled on that either." The Grievant's

[6] The record shows (E-4) that the Grievant has experience with the extra shift posting process having been assigned and worked extra shifts on numerous occasions.

testimony does not reveal any confusion between the two schedules. His testimony is that he checked both and his name was not circled on either.

From the meeting with the Grievant on June 5, 2006 there is conflicting statements as to what the Grievant's response was when asked why he failed to call or show up for the May 31 shift. Director of Nursing, Przepiora testified that the Grievant's response at the meeting was "he didn't know he was awarded the shift as he had no opportunity to see the schedule." Pzepiora also testified that the Grievant told her that, "he didn't work to see the posted schedule from the time it was posted (5/25) through May 30, 2006."

Przepiora's testimony is consistent with that of Administrator Lacina. Lacina testified that. "The Grievant lied that he didn't work the days before May 31, 2006." Lacina testified on cross-examination that, "The Grievant said he was not at work on shifts prior to May 31, 2006 – he lied that his name was not circled when it was in fact."

Przepiora acknowledge on cross-examination that her notes from the June 5, 2006 meeting with the Grievant contained the following statement: "Hans stated he worked the Tuesday [5/30] before and he was not circled on the pickup shift list."

However, the following sentences in Pzepiora's notes states, "Hans stated he was off then and did not know the shift had been given to him – this was found to be incorrect. Hans worked on Thursday and Friday the 25th and 26th of May. Our scheduling person hung the hours on Thursday and his name was circled which indicated he got the extra hours. A review of Hans file also indicated a history of tardiness."

An examination of Przepiora's notes (E-6) and the testimony of the persons present at the meeting (Grievant, Przepiora, Kistner and Owusu) provides clarification of the seeming confusion of statements in Pzepiora' notes. The testimony is that Staffing Coordinator, Kistner, was directed during the meeting to obtain documents that would establish when the Grievant worked prior to May 31, 2006.

It is apparent that the reason Kistner was directed to obtain documents, establishing when the Grievant worked, was to determine if he was telling the truth by stating that, "he was off then and did not know the shift had been given to him." Therefore, Przepiora's notes (E-6) are not inconsistent when viewed in the context that the Grievant first stated that, "he was off then and did not know the shift had been given to him" and later, when confronted with the documentation brought by Kistner stated, he "worked the Tuesday before and [his name] was not circled on the pickup list."

Owusu's testimony was that the Grievant stated that, "he did not see his name circled on the schedule, but did not hear him say he was not at work on days prior." Owusu's notes, from the June 5, 2006 meeting, contained a statement "(Checked sign-up on 5/30) but this was her own comment and was not information from the Grievant.

Lastly to be examined is the relative creditability of witnesses Kistner and the Grievant.

The Arbitrator finds the Grievant's testimony to be the least creditable. The Grievant stated he had never lied in his 54 years. However, the record indicates he was less than truthful at the June 5, 2006 meeting when offering his first excuse for not calling or showing up for the May 31, 2006 shift. Further the record shows his testimony was less than fully responsive and at times evasive.

AWARD

The grievance is denied.

The Grievant did not established "a justifiable excuse" for his failure to call-in or report for work on May 31, 2006. Therefore, there is "just cause" for termination of the Grievant in accordance with Section 8.5 of the CBA. The record shows that this provision of the CBA has been applied uniformly and consistently.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 22nd day of September 2006 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR